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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re R.L., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. R.L., Defendant and Appellant.	A120821 (Sonoma County Super. Ct. No. 34790J)

This is a juvenile delinquency case. Following R.L.'s admission of an allegation that he unlawfully possessed a "billy" club, the prosecutor amended the juvenile petition to allege additional charges against him, including assault with a deadly weapon by means of force likely to produce great bodily injury. R.L. admitted the additional allegation of assault with a deadly weapon and the remaining allegations were dismissed. In this appeal, R.L. argues the juvenile court erred when it denied his motion to dismiss the amended petition brought under Penal Code[1] section 654, and the holding of *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*). In the published portion of this opinion, we conclude the prosecutor did not violate section 654's bar to multiple prosecutions or the rule in *Kellett* because proceedings on the first petition were not yet concluded when

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts B and C.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

the amended petition was filed. R.L. also contends the court failed to specify whether his offenses were misdemeanors or felonies, as required by Welfare and Institutions Code section 702. We agree and remand for that purpose. On remand, we also direct the juvenile court to determine whether section 654's prohibition of multiple punishments limited R.L.'s possible maximum term of commitment.

FACTUAL AND PROCEDURAL BACKGROUND

R.L. was already a ward of the court when an October 26, 2007, petition alleged that he unlawfully possessed a "billy" club. R.L. admitted the allegation on October 29, and was referred for evaluation by the probation department. When the court took R.L.'s admission, the prosecutor stated, "for the record there ha[ve] been no promises regarding any further findings or filings based on incidents related to this event."

On November 1, the prosecutor filed an amended petition that alleged R.L. committed four additional offenses on the same day as the "billy" offense, including assault with a deadly weapon and by means of force likely to produce great bodily injury.[2] R.L. moved to dismiss the amended petition as barred under section 654 and the rule in *Kellett.* He argued that the prosecutor knew or should have known about the basis for the additional charges against R.L. before he admitted the "billy" offense. The prosecution argued that the amended petition was based on supplemental police reports received by the district attorney after R.L. admitted the "billy" offense, and involved criminal conduct that was not transactionally related to the "billy" offense. The court denied R.L.'s motion to dismiss on the basis that the amended petition was justified due to new evidence the prosecutor received from the police.[3]

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[2] The other allegations were two counts of misdemeanor vandalism and one burglary. The petition was later amended to allege the vandalism counts were felonies rather than misdemeanors.

[3] None of the police reports is in the record, nor does it appear they were admitted in evidence or shown to the court during the hearing on the *Kellett* motion. According to the parties' arguments in the juvenile court, R.L. was detained by police officers who saw him running with a baseball bat near the site of a reported altercation involving several

The parties thereafter reached a negotiated disposition in which R.L. agreed to admit the assault count in exchange for dismissal of the remaining charges. At the dispositional hearing, R.L. was continued as a ward on probation in the home of his grandmother, with various terms and conditions. His remaining maximum time of confinement was computed to be 56 months and six days, based on his admitted offenses and a prior misdemeanor vandalism. R.L. timely appealed.

DISCUSSION

A. *Section 654's Proscription Against Multiple Prosecutions*

Section 654 provides, in relevant part: "An acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission under any other." In *Kellett*, our Supreme Court held that when "the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Kellett, supra*, 63 Cal.2d at p. 827.) The *Kellett* rule applies to juvenile proceedings. (See, e.g., *In re Dennis B.* (1976) 18 Cal.3d 687, 692-696; *In re Benny G.* (1972) 24 Cal.App.3d 371, 375-377.)

The Attorney General argues that section 654 and *Kellett* were not violated in this case because R.L. "was not convicted *and sentenced* for the 'billy' offense when he was charged with the amended offenses."[4] As the Attorney General points out, "the

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young Hispanic males. Other officers later interviewed witnesses who saw R.L. enter the garage of the victim, where R.L. was present while his associate hit the victim and damaged his car. Another car parked nearby was also vandalized after R.L. and his associates fled from the garage.

[4] Although R.L. contends this argument was waived because it was not made below, the briefs of both parties address it on the merits and it raises a question of law that we will consider in this appeal. (See *Francies v. Kapla* (2005) 127 Cal.App.4th 1381, 1386.)

dispositional hearing for the 'billy' offense did not occur until after the amended charges were resolved by [R.L.'s] admission and were included in that disposition." (See *People v. Hartfield* (1970) 11 Cal.App.3d 1073, 1080 ["under [section 654], successive prosecution is only prohibited after conviction *and sentence*"].) While " 'conviction' and 'sentence' are terms of art not generally applicable to juvenile proceedings," we agree with the Attorney General's suggestion that "[u]nder juvenile rules, the sustaining of charges after a jurisdictional hearing . . . would be equivalent to an adult conviction, and the dispositional hearing would be equivalent to an adult sentencing." R.L. would have us disregard the sentencing prong of section 654 and *Kellett* because "whether [he] was 'sentenced' at the time the amended charges were filed is not applicable here because this was a juvenile proceeding." We will not do so.

The dispositional phase of a juvenile delinquency proceeding is the functional equivalent of criminal sentencing. Although it may not be retributive, just as in a criminal case, punishment is an authorized objective of a juvenile court dispositional order. (*In re Josh W.* (1997) 55 Cal.App.4th 1, 8.) Accordingly, the bar of section 654 was not violated in this case because, even though R.L. had admitted to the "billy" charge, when the petition was amended he was still awaiting disposition of the "billy" charge and the proceedings had not concluded.

Our result is consistent with the purpose of section 654 to prevent harassment of persons accused of crimes after they have been acquitted or received a sentence with which the prosecutor was not satisfied. (See, e.g., *Kellett*, *supra*, 63 Cal.2d at pp. 825-826 [were double punishment permissible, "[i]t would constitute wholly unreasonable harassment . . . to permit trials seriatim until the prosecutor is satisfied with the punishment imposed"]; *In re Benny G.*, *supra*, 24 Cal.App.3d at pp. 376-377 [minor's exoneration on robbery charge barred subsequent petition that alleged he was an accessory to the robbery]; cf. *People v. Hartfield*, *supra*, 11 Cal.App.3d at p. 1073 [purpose of section 654's rule against multiple prosecution would not be served when there was no harassment of defendant].) Section 654 does not bar all successive

prosecutions, only those that follow an acquittal or a conviction and sentence. (See § 654; *Kellett, supra*, at p. 827; *People v. Hartfield, supra*, at p. 1080.)

R.L. was neither acquitted, nor had he received a disposition which was equivalent to a sentence before the amended petition was filed. Thus, section 654's proscription of multiple prosecutions had no application to his case, and we need not address the parties' additional arguments regarding whether an exception to the *Kellett* rule applied here because the prosecutor was " ' " 'unable to proceed on the more serious charge[s] at the outset because the additional facts necessary to sustain th[ose] charge[s had] not occurred or [had] not been discovered despite the exercise of due diligence.' " ' " (*People v. Davis* (2005) 36 Cal.4th 510, 558.)[5]

B. *Section 654's Prohibition of Multiple Punishment*

Section 654, subdivision (a) also provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." R.L. argues that the confinement periods assessed against him for possession of an unlawful weapon and assault with a deadly weapon "should have been imposed concurrently because the two

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[5] The prosecutor's remarks at the hearing when R.L. admitted the "billy" allegation indicate the prosecutor was aware that additional charges might be filed at the time he elected to proceed with the initial petition, and the People conceded that the police investigation of the incident was completed "within a couple of hours of the incident" even though the prosecutor said he did not receive the supplemental police reports until much later. We in no way condone the prosecution's conduct. It appears to undermine the policies behind section 654, and would arguably violate the *Kellett* rule if the bar against multiple prosecution were triggered in this case. (See *Kellett, supra*, 63 Cal.2d at p. 828 ["it has always been necessary for prosecutors carefully to assess the seriousness of a defendant's criminal conduct before determining what charges should be prosecuted against him"]; see also *In re Johnny V.* (1978) 85 Cal.App.3d 120, 141-142 [section 654 applied in case where "the prosecutor made a deliberate choice of continuing with the adjudicatory hearing . . . [and] clearly *should have known* of the two possible offenses"].) While we condone neither the prosecutor's haste on the "billy" charge nor the possible delay in amending the petition, these actions did not trigger a violation of section 654.

offenses involved a continuous course of conduct for the same incident."[6] The Attorney General contends that "in light of [R.L.'s] possession of the billy before, during and after the assault, he was properly punished for both offenses."[7] The record does not indicate that the juvenile court considered this question, and we direct it to do so on remand.

C. *The Felony-Misdemeanor Offenses*

Welfare and Institutions Code section 702 provides, in relevant part: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony."[8] Assault with a deadly weapon and unlawful possession of a weapon both come within this definition. (§§ 245, subd. (a)(1), 12020, subd. (a)(1).)

R.L. argues that the court failed to exercise its discretion to determine whether his offenses should be treated as misdemeanors or felonies, as required by Welfare and Institutions Code section 702 and the California Rules of Court. We agree, and remand to permit the court to do so. (See *In re Manzy W.* (1997) 14 Cal.4th 1199, 1210-1211.)

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[6] The court calculated a confinement period of 48 months for the assault with a deadly weapon and eight months for the possession of an unlawful weapon. The total maximum period of confinement also included a term based on an earlier case that R.L. does not challenge on this appeal.

[7] The Attorney General initially suggests R.L.'s double punishment claim is "not ripe," but acknowledge that he "was required to serve 60 days in juvenile hall as part of his disposition of being retained as a ward at home." R.L. contends the claim is ripe because if he fails to raise it now, he will be precluded from doing so in the future. (See *In re David H.* (2003) 106 Cal.App.4th 1131, 1136 [precluding later redetermination of the maximum confinement time for a previously sustained petition].)

[8] California Rules of Court, rule 5.795(a), which governs dispositional hearings, provides: "Unless determined previously, the court must find and note in the minutes the degree of the offense committed by the youth, and whether it would be a felony or a misdemeanor had it been committed by an adult. If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and expressly declare on the record that it has made such consideration and must state its determination as to whether the offense is a misdemeanor or a felony." (See also Cal. Rules of Court, rules 5.780(e)(5), 5.790(a)(1).)

The Attorney General argues remand is not necessary because R.L.'s plea agreement specified the assault admitted by R.L. was a felony, and it is not reasonably probable that remand would result in a reduction of the weapon possession offense to a misdemeanor. Although it is unlikely that the juvenile court would classify R.L.'s offense as a misdemeanor in light of the plea agreement, the record of the plea hearing is equivocal and we cannot tell whether the court exercised its discretion to classify the crime as a felony. When it took R.L.'s plea, the court said: "So as to Count V, do you admit that on October 24th of last year you willfully and unlawfully committed an assault upon Andrew B. with a deadly weapon, which was a baseball bat, and by means of force likely to produce great bodily injury, violating Penal Code section 245(a)(1), which is a four-year felony?" R.L. then admitted the allegation.

Our Supreme Court has rejected the argument that the juvenile court's imposition of a felony-length term following just such an admission is an "implied" declaration under the statute. (*In re Manzy W., supra*, 14 Cal.4th at pp. 1207-1209 ["neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony"], citing *In re Kenneth H.* (1983) 33 Cal.3d 616.) "Here, as in those cases, the crucial fact is that the court did not state at any of the hearings that it found the [offense] to be a felony." (*Id.* at p. 620.) While the Attorney General contends the court's approval of the plea precluded the designation of the assault offense as a misdemeanor, none of the cases he relies upon address the court's discretion to determine the status of a felony misdemeanor offense. Nor does the Attorney General distinguish *People v. Statum* (2002) 28 Cal.4th 682, cited by R.L., where the court acknowledged as their remedy the People's right to appeal from a trial court's imposition of a misdemeanor sentence after the defendant pled guilty to a felony. (*Id*. at pp. 688-689 [observing that "when the superior court imposed a county jail sentence, it exercised a ' "sui generis" ' power [citation] to modify the felony verdict or finding to a misdemeanor"; see also *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974-

975 [holding that courts retain discretionary authority under the three strikes law to determine whether a wobbler should be reduced to a misdemeanor].)

Because the record does not establish the juvenile court was aware of, and exercised its discretion to categorize each of the sustained allegations as a felony or misdemeanor, we remand for the declaration required by Welfare and Institutions Code section 702 and the California Rules of Court. (See *In re Manzy W.*, *supra*, 14 Cal.4th at pp. 1209-1210; *In re Eduardo D.* (2000) 81 Cal.App.4th 545, 548-549; *In re Jorge Q.* (1997) 54 Cal.App.4th 223, 238.)

DISPOSITION

The case is remanded to allow the juvenile court to consider whether punishment for both offenses is barred by section 654, and to declare whether each of R.L.'s offenses is a misdemeanor or a felony, as required by Welfare and Institutions Code section 702 and the California Rules of Court. The court shall recalculate the maximum period of confinement as necessary in accordance with its determinations. The court's orders are otherwise affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.

In re R.L., A120821

Trial Court:	Sonoma County Superior Court
Trial Judge:	Honorable Raima H. Ballinger
Counsel for Appellant:	Jenny Huang Candace Chen Justice First
Counsel for Respondent:	Edmund G. Brown, Jr. Attorney General of the State of California Dane R. Gillette Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Laurence K. Sullivan Supervising Deputy Attorney General Martin S. Kaye Supervising Deputy Attorney General